Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. ...77-339

RUTH ANN REED, as Administratrix of the Estate of DAN WILLIAM REED, deceased, and as parent, natural guardian, and best friend of CYNTHIA ANN REED, DEBORA LYNN REED and JULIE MARIE REED, all infants *et al.*,

Petitioners,

v.

FORWOOD CLOUD WISER, JR., and RICHARD E. NEUMAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Ruth Ann Reed *et al.*, pray for a *writ of certiorari* to review the judgment of the United States Court of Appeals for the Second Circuit entered in these proceedings on April 26, 1977.[1]

Opinions Below

The opinion of the Court of Appeals appears at pages 28-56 of the separate appendix ("App.") and is reported at 555 F.2d 1079. The opinion of the Court of Appeals

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[1] Additional petitioners are Gily Epstein Bard, Jean F. Gilday, Rose Baum Kraut and First National City Bank, and James K. Orphan.

denying petitioners' motion for rehearing or rehearing *en banc* entered June 6, 1977 appears at App. 60. The opinion of the district court appears at App. 61-75 and is reported at 414 F.Supp. 863.

Jurisdiction

The judgment of the Court of Appeals was entered on April 26, 1977. Petitioners' motion for rehearing or rehearing *en banc* was denied on June 6, 1977 (App. 60). The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Does the importance of the issues at bar to this case and numerous pending and future cases warrant the grant of *certiorari*?

2. Should the Warsaw Convention Treaty,[2] which limits the damages recoverable from "the carrier," be judicially extended to its employees and agents?

3. Since the common law rights of passengers to full compensation are derogated by the Warsaw Convention, should it be strictly construed and not extended beyond the scope justified by its language and history?

Treaty Involved

The official French text of the Warsaw Convention, followed by the official English translation, appear in the Statutes at Large, 49 Stat. 3000 *et seq.*, and are set forth in the Appendix. The most immediately relevant provisions

[2] 49 Stat. 3000; T.S. 876.

are contained in Chapter III, "Responsabilite du Transporteur" (49 Stat. 3005)—"Liability of the Carrier" (49 Stat. 3018).

Article 17. (Official French text)

"Le transporteur est responsable du dommage survenu en cas de mort, de blessure ou de toute autre lésion corporelle subie par un voyageur lorsque l'accident qui a causé le dommage s'est produit à bord de l'aéronef ou au cours de toutes opérations d'embarquement et de débarquement." 49 Stat. 3005.

Article 17. (Official English translation)

"The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking." 49 Stat. 3018.

Article 20. (Official French text)

"(1) Le transporteur n'est pas responsable s'il prouve que lui et ses préposés ont pris toutes les mesures nécessaires pour éviter le dommage ou qu'il leur était impossible de les prendre.

"(2) Dans les transports de marchandises et de bagages, le transporteur n'est pas responsable, s'il prouve que le dommage provient d'une faute de pilotage, de conduite de l'aéronef ou de navigation, et que, à tous autres égards, lui et ses préposés ont pris toutes les mesures nécessaires pour éviter le dommage." 49 Stat. 3005.

Article 20. (Official English translation)

"(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary meas-

ures to avoid the damage or that it was impossible for him or them to take such measures.

"(2) In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage." 49 Stat. 3019.

Article 22. (Official French text)

"(1) Dans le transport des personnes, la responsabilité du transporteur envers chaque voyageur est limitée à la somme de cent vingt cinq mille francs. Dans le cas où d'après la loi due tribunal saisi, l'indemnité peut être fixée sous forme de rente, le capital de la rente ne peut dépasser cette limite. Toutefois par une convention spéciale avec le transporteur le voyageur pourra fixed une limite de responsabilité plus élevée." 49 Stat. 3006.

Article 22. (Official English translation)

"(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability." 49 Stat. 3019.

Article 24. (Official French text)

"(1) Dans les cas prévus aux articles 18 et 19 toute action en responsabilité, à quelque titre que ce soit, ne peut être exercée que dans les conditions et limites prévues par la présente Convention.

(2) Dans les cas prévus à l'article 17, s'appliquent également les dispositions de l'alinéa précédent, sans préjudice de la détermination des personnes qui ont le droit d'agir et de leurs droits respectifs." 49 Stat. 3006.

Article 24. (Official English translation)

"(1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.

"(2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights." 49 Stat. 3020.

Article 24. (Translation by Circuit)[3]

"(1) In the *events anticipated* in articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.

(2) In the *events* covered by article 17 the provisions of the preceding paragraph shall also apply, ..." (Emphasis added to denote the only difference with the official English translation.)

Article 25. (Official French text)

"(1) Le transporteur n'aura pas le droit de se prévaloir des dispositions de la présente Convention qui excluent ou limitent sa responsabilité, si le dommage provient de son dol ou d'une faute qui, d'après la loi due tribunal saisi, est considérée comme équivalente au dol.

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[3] App. 37.

"(2) Ce droit lui sera également refusé si le dommage a été causé dans les mèmes conditions par un de ses préposés agissant dans l'exercise de ses fonctions." 49 Stat. 3006.

Article 25. (Official English translation)

"(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

"(2) Similarly the carrier shall not be entitled to avail himself of these said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment." 49 Stat. 3020.

Statement

This action arises from the crash of a Trans World Airlines (TWA) Boeing 707 in the Ionian Sea on September 8, 1974. All 79 passangers and 9 crewmembers were killed in the crash.

Petitioners are the personal representatives of 9 passengers. They seek compensatory damages from the respondents, employees of TWA, whose negligence was a proximate cause of the crash (R7, 8-16).[4]

In their Answer, respondents asserted as an affirmative defense that the provisions of the Warsaw Convention

[4] References preceded by "R" refer to pages of the record contained in the joint appendix submitted to the Second Circuit.

and the Montreal Agreement[5] limited their liability for damages to a maximum of $75,000 per passenger (R28 ¶ 45).

Proceedings Below

Petitioners moved to strike the damage limitation affirmative defense or, alternatively, for partial summary judgment. The Honorable Marvin E. Frankel, U.S.D.J., granted the motion to strike. 414 F.Supp. 863 (App. 61). On an appeal pursuant to 28 U.S.C. § 1292(b), the Court of Appeals for the Second Circuit reversed the Order of the District Court with instructions to reinstate the damage limitation affirmative defense (App. 58-9).

Reasons for Granting the Writ

I. This case involves important issues warranting resolution by this Court

The importance of the questions raised by this case was recognized by the Circuit Court.

> "The question of whether an airline employee sued for damages for personal injuries may invoke the convention's liability limitations is of great importance to international air disaster litigation and, so far as we know, is here raised for the first time at the federal appellate level" (App. 31).

Vast numbers of Americans travel on international flights each day and many sustain property damage, injury or death each year. Since an American treaty is involved, the Courts, the traveling public and the airlines

[5] CAB Agreement 18900, Order E-23680, May 13, 1966 (Docket No. 17325). By signing the Montreal Agreement, TWA agreed to increase its liability to $75,000 and waived Warsaw's Article 20(1) defense of no fault.

should receive a definitive disposition which only this Court can issue. The Circuit's holding conflicts with prior decisions of this Court (Point II), the language of the Treaty (Point III) and basic common law rights (Point IV).

Aside from the effect upon the numerous families of decedents at bar, resolution of the issues is of much concern in at least two other pending airplane cases involving multiple deaths in which employees of the airline have been sued.[6] It is believed, moreover, that the issue will continue to be raised in other Circuit Courts until this Court sets the matter at rest.

II. The Circuit's decision conflicts with prior decisions of this Court which prohibit judicial treaty-making

The Warsaw Convention specifically limits "the liability of the carrier" to a specific sum. Article 22. The "carrier" is TWA, but the Court below has added "and its employees," words omitted by the Treaty. Over 150 years ago, Mr. Justice Story refused to extend a treaty to a situation omitted therein. *The Amiable Isabella,* 19 U.S. (6 Wheat.) 1 (1921).

> "In the first place, this Court does not possess any treaty-making power. That power belongs by the constitution to another department of the government; and *to alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power,* and not an exercise of judicial functions. *It would be to make, and not to construe a treaty.* Neither can this Court supply a casus omissus in a treaty, any more than in a law. *We are to find out the intention of the parties by just rules of interpretation* applied to the subject matter; and having found that, our duty is to follow it as far as it goes, *and to stop where that stops*—whatever may be the imperfections or difficulties which it leaves behind." *Id.* at 71 (emphasis added).

[6] *Air Crash Disaster at Pago, Pago, American Samoa on January 30, 1974,* M.D.L. No. 176, in the Central District of California, and *In re Air Crash at John F. Kennedy International Airport on June 24, 1975,* M.D.L. No. 227, in the Eastern District of New York.

The *Amiable Isabella* prohibits the addition of any omitted words and extension of the Treaty at bar beyond "the carrier".

In *Rocca* v. *Thomson,* 223 U.S. 317, 332 (1912), this Court stated:

> "[T]reaties are the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning and to choose apt words in which to embody the purposes of the high contracting parties. Had it been the intention to commit the administration of estates of citizens of one country, dying in another, exclusively to the consul of the foreign nation, it would have been very easy to have declared that purpose in unmistakeable terms."

Similarly, if the drafters of Warsaw intended to limit the liability of employees and agents of the airlines they could readily have done so in unmistakeable terms. As stated by the District Court, "The limitations for agents and employees would have been easy enough to specify" (App. 68). Just as they defined "international transportation" in article 1(2), the drafters could have simply added a definition of "carrier" that included employees and agents.

The decision of the Circuit Court was in part based on what it believed the drafters of Warsaw would have writ-

ten if they foresaw that the airlines would be required to indemnify and/or insure their employees and agents.[7] But the Circuit's belief is inappropriate because the Treaty's drafters only undertook to limit "the liability of the carrier" and the carrier, TWA, is not a party to this action. The Treaty cannot now be redrafted to do what the drafters omitted or did not intend or consider.

The Circuit Court's decision also is in direct conflict with *Pierre* v. *Eastern Airlines, Inc.*, 152 F.Supp. 486 (D.N.J. 1957) and *Stratton* v. *Trans Canada Airlines*, 27 D.L.R.2d 670 (B.C.Sup. Ct. 1961), *aff'd on other grounds*, 32 D.L.R. 2d 736 (B.C.Sup. Ct. App. 1962) (R 165-90). These cases were followed by the well-reasoned decision of the District Court.

III. The Circuit's decision conflicts with the plain language of a United States treaty

Since the Warsaw Convention is a treaty of the United States, it is the supreme law of the land. U.S. Const. Art. VI. The plain language of the Treaty shows that it limits the liability of the carrier, but not its employees. This Court should exercise its *certiorari* jurisdiction to correct the significant error of the Circuit Court.

There is nothing in any part of Warsaw which imposes liability on or limits the liability of carrier's employee or agent. They simply are outside the scope of Warsaw, which governs only the rights and liabilities of passengers and air carriers.

The operative sections of chapter III of Warsaw, entitled "Liability of the Carrier," which imposes (Article 17) and limits (Article 22) liability refer only to "the carrier." By contrast, Article 20(1) and (2) and Article

[7] The indemnification/insurance development, which post-dates Warsaw, is signficant because it reflects the belief of airlines and their employees that Warsaw did not extend to employees.

25(2), in referring to "agents," specifically draw a distinction between the carrier and employees-agents of the carrier, and show that the liability of the carrier and the liability of employees-agents is separate and independent. Any other interpretation would render the word "agents" in Articles 20 and 25 redundant.

The distinction drawn by Warsaw between the carrier and agents-employees is particularly evidenced by Article 20(2). It declares that the carrier is not liable for property damage caused by pilot error, provided neither the carrier nor his agents were otherwise at fault. But Warsaw contains no provision either imposing liability or relieving the pilot from liability for the damage to property he causes.

There is no basis for the determination by the Circuit that Article 24 supports extension of Warsaw's damage limit to employees and agents. To reach this determination, the Circuit had to change the official English translation that has appeared in the Statutes at Large for over 40 years (both translations appear on page 5 *supra*).[8]

Article 24 was only intended to have Warsaw apply regardless of whether actions were brought by passengers, heirs or personal representatives and whether the action sounded in contract, tort or quasi-contract. This was Professor Matte's[9] analysis of Article 24 and, based on that analysis, he concluded (translation follows the French):

"L'Art 24 de la Convention, dans ses deux alinéas,

[8] Other translators of the word "cas", which also appeared in the proposed draft of Article 24, have translated it as "cases", not "events". Page 211 of Minutes, Second International Conference on Private Aeronautical Law, October 4-12, 1929, Warsaw, by R. Horner & D. Legrez (English translation 1975). The pages of the Warsaw minutes that pertain to Article 24 are set forth in the Appendix in French and English (Horner-Legrez translation). Significantly, the Minutes omit any reference to employees or agents.

[9] Matte, TRAITE DE DROIT AERIEN-AERONAUTIQUE, 422-23 (1964).

precise que les limitations prévues par la Convention, en ce qui concerne la responsabilité du transporteur, se réfèrent également, aux art. 17, 18 et 19 sans préjudice, quant à Part. 17, de la détermination des personnes qui ont le droit d'agir, et de leurs droits respectifs. Ces stipulations ont comme but de garantir l'application uniforme de la Convention, quel que soit le plaignant (la personne contractante ou ses héritiers) (145) et quel que soit le droit d'action (contractuelle délictuelle ou quasi-délictuelle) (146).

"Etant donné que la Convention ne règle que la responsabilité due transporteur dans les circonstances prévues par les arts. 17-19 (responsibilité contractuelle), il y a certaines situations où la Convention n'exclut pas d'autres actions:

"a) La Convention ne s'applique pas aux préposés (et substituts) du transporteur: les actions directes contre ces personnes ne sont pas soumises à la présomption de faute ou des limites de la responsabilité (147); . . ."

"Article 24 of the Convention, in its two paragraphs states that the limitations provided for by the Convention, so far as the liability of the carrier is concerned, pertain likewise to Articles 17, 18 and 19, without prejudice, with respect to Article 17, to the determination of the persons who have the right to act, and of their respective rights. These stipulations have the purpose of guaranteeing the uniform application of the Convention, regardless of who the plaintiff might be (the contracting party or his heirs) (145), and regardless of the right of action (contractual, or delinquent, or quasi-delinquent) (146).

"Since the Convention regulates only the liability of the carrier in the circumstances referred to in Articles 17-19 (contractual liability), there are certain situations in which the Convention does not exclude other actions:

"a) The Convention does not apply to the agents (and substitutes) of the carrier: direct actions against

these persons are not subject to the presumption of fault or of the limits of liability (147); . . ."

IV. The Circuit's decision is in derogation of the basic common law right of petitioners to full compensation from the negligent defendants

The conclusion of the Circuit Court adversely affects the common law rights of the petitioners, many plaintiffs in presently pending cases and numerous Americans to be damaged each year in international transportation.

The Common Law

It is clear that at common law[10] the respondents, independent of their corporate employer, would be personally liable for their negligence in contributing to the deaths of the decedents.

In *Brady* v. *Roosevelt, S.S. Co.*, 317 U.S. 575, 580 (1943), the Court stated:

> "The liability of an agent for his own negligence has long been imbedded in the law . . . [T]he principle is an ancient one . . . ."

See also Prosser, Law of Torts, § 93 (4th ed. 1971); Shearman & Redfield, Law of Negligence, § 262 (1941) [1970 supp.]; 19 C.J.S. Corporations, § 845 (1945); Restatement of Agency, Second, § 343 (1957).

Numerous cases strictly construe and narrowly apply laws in derogation of common law rights. Thus, in a precisely analogous case, *Herd & Co.* v. *Krawill Machinery Corp.*, 359 U.S. 297 (1959), the Carriage of Goods by

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[10] The civil law, as hereafter discussed, is identical to the common law in this respect.

Sea Act limited the damages recoverable from the carrier. An agent of the carrier claimed the benefit of the limitation. In refusing to extend the limit to the agent, the Court stated:

> "Any such rule of law [shielding an agent from liability for his own negligence], being in derogation of the common law, must be strictly construed, for '[n]o statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express [citation omitted].'" *Id.* at 304-5.

See also *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907); *Shaw* v. *Railroad Co.*, 101 U.S. 557 (1879).

The Warsaw Convention is in clear derogation of the petitioners' common law right to recover full compensation from TWA. The Circuit Court has further derogated the common law rights of the petitioners by extending Warsaw to the employees of TWA. It has done so, moreover, even though the history, background and language of Warsaw demonstrates its applicability to TWA, but not to the respondents.

The Civil Law

The Warsaw Convention was the work product of the International Technical Committee of Aerial Legal Experts[11] (hereafter the CITEJA). The CITEJA was mainly composed of lawyers from civil law countries.[12] But, as is

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[11] Comite International Technique d'Experts Juridique Aeriens (CITEJA).

[12] An English lawyer was also a member of the CITEJA. See Ide, *The History and Accomplishments of the International Technical Committee of Aerial Legal Experts (C.I.TE.J.A.)*, 3 J. Air Law & Comm. 27, 48 (1932).

the case under the common law, it is a basic civil law principle that a negligent tortfeasor is personally liable for his own acts. This principle derives from the French Code Napoleon:

> "Art. 1382. Any act by which a person causes damages to another makes the person by whose fault the damage occurred liable to make reparation for such damage.
>
> "Art. 1383. Everyone is liable for the damage he causes not only by his acts, but also by his negligence or imprudence."

These provisions are translated in Von Mehren, THE CIVIL LAW SYSTEM, Ch. 7, p. 339 (1957). See also Italian Civil Code, Title IX, Art. 2043; German Civil Code, Art. 823; Swiss Code of Obligations, Ch. II, Art. 41; Soviet Civil Code, Law of Obligations, Ch. XII, Art. 403.

Despite the fact that the above authorities were presented to the Circuit Court, it concluded that Article 22(1) would have the effect of limiting the liability of employees "in at least some [civil law] jurisdictions" (App. 35). But the Circuit did not cite any civil law jurisdiction, code provision or case to support that startling conclusion. Instead, the Court below relied on the unsupported beliefs expressed by delegates to conferences that took place after Warsaw was adopted (App. 35-7).

Post-Warsaw History

The unsuccessful attempt of the Hague Protocol to extend Warsaw to airline employees also demonstrates the Circuit's error.

The Hague Protocol was drafted by the International Conference on Private Air Law which met at the Hague in 1955. The Hague Conference was called for the express

purpose of revising the Warsaw Convention. Among the amending provisions was a new Article 25A,[12] which expressly extended Warsaw's limit of liability to the carrier's servants and agents.

But Hague was not approved by and thus is not the law in the United States. *Alexandre* v. *Eastern Airlines, Inc.*, 9 Avi. 17,844 (W.D.N.Y. 1965). Cf. *Mertens* v. *Flying Tiger Line, Inc.*, 341 F.2d 851 (2d Cir. 1965), *cert. denied*, 382 U.S. 816 (1965). In *Mertens*, a draft protocol submitted to the Hague Conference was relied upon in holding that military charter flights were subject to Warsaw. While the proposed amendment was rejected at the Hague Conference, an Amendment was adopted giving a nation adhering to the Protocol

> "the legal power to declare that the [Warsaw] Convention shall not apply to military charter flights on aircraft registered in that country, . . . *The United States has not yet ratified the Hague Protocol* and obviously has not made the requisite declaration under that Protocol. *The unavoidable conclusion is that the Warsaw Convention, as it is presently binding on the United States, is applicable to the flight in this suit.*" *Mertens, supra* at 854.

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[12] Article 25A provides:

"1. If an action is brought against a servant or agent of the carrier arising out of damage to which this Convention relates, such servant or agent, if he proves that he acted within the scope of his employment, shall be entitled to avail himself of the limits of liability which that carrier himself is entitled to invoke under Article 22.

"2. The aggregate of the amounts recoverable from the carrier, his servants and agents, in that case, shall not exceed the said limits.

"3. The provisions of paragraphs 1 and 2 of this article shall not apply if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result."

This reasoning should also have been employed by the Circuit in the instant case. Instead, the Circuit erroneously concluded that Warsaw already afforded protection to employees and agents. If this was so, however, there would have been no need for Article 25A.

CONCLUSION

For the foregoing reasons, this petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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Certificate of Service.

Melvin I. Friedman, an attorney for petitioner and a member of the Bar of this Court certifies that on September 2, 1977, three copies of the foregoing Petition for a Writ of Certiorari and separate Appendix were served by mail upon all parties required to be served as follows:

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Dated: September 2, 1977

MELVIN I. FRIEDMAN